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Paper No. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MIREILLE MAUBRU
and MARIE-PASCALE AUDOUSSET

Appeal No. 2002-2036
Application No. 09/486,558

HEARD: MARCH 6, 2003

Before KIMLIN, OWENS, and PAWLIKOWSKI, Administrative Patent
Judges.

PAWLIKOWSKI, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final
rejection of claims 20-47. Claims 1-19 have been canceled.

Claim 20 is representative of the subject matter on appeal
and is set forth below:

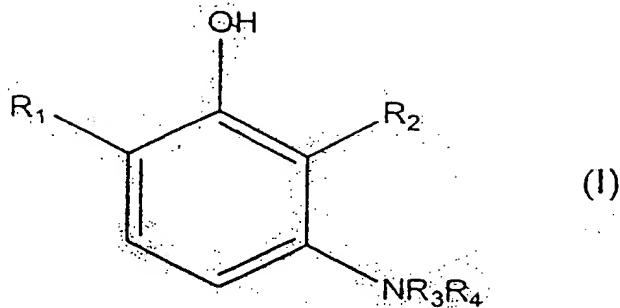
20. A composition for the oxidation dyeing of keratin
fibers comprising:

- at least one oxidation base chosen from diaminopyrazoles,
traminopyrazoles, and acid-addition salts thereof;
- and at least one coupler chosen from halogenated meta-
aminophenols of formula (1) and acid addition salts thereof:

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in which:

- R₁ and R₂, which are identical or different, are chosen from a hydrogen atom, a halogen atom, a C₁-C₄ alkyl radical, a C₁-C₄ alkoxy radical, a C₁-C₄ monohydroxyalkyl radical, a C₂-C₄ polyhydroxyalkyl radical, a C₁-C₄ monohydroxyalkoxy radical and a C₂-C₄ polyhydroxyalkoxy radical;
- R₃-R₄, which are identical or different, are chosen from a hydrogen atom, a C₁-C₄ alkyl radical, a C₁-C₄ monohydroxyalkyl radical, a C₂-C₄ polyhydroxyalkyl radical and a C₁-C₄ monoaminoalkyl radical;

with the proviso that at least one of said radicals R₁ and R₂ is a halogen atom.

The examiner relies upon the following references as evidence of unpatentability:

Kalopissis et al. (Kalopissis)	3,918,896	Nov. 11, 1975
Clausen et al. (Clausen)	5,061,289	Oct. 29, 1991

Claims 20-47 stand rejected under 35 U.S.C. § 103 as being unpatentable over Kalopissis in view of Clausen.

Appellants group the claims in one group (brief, page 3). Hence, we consider claim 1 in this appeal. 37 CFR § 1.192(c)(7)(8)(2000).

OPINION

Upon careful review of the entire record, including the respective positions advanced by appellants (brief and reply brief) and the examiner (examiner's answer), we find ourselves in agreement with the examiner and sustain the aforementioned rejection for the following reasons.

Beginning on page 4 of the brief, appellants argue that Kalopissis specifically teaches that the dye composition according to the invention is characterized by the following essential features: the dye composition must contain a paraphenylenediamine or a paraaminophenol or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine. Appellants refer to column 2, lines 67 through column 32, line 5 of Kalopissis.

On the other hand, on page 6 of the answer, the examiner interprets this aspect of Kalopissis as teaching that a conventional oxidation base is essential rather than that a paraaminophenol is essential. Hence, this aspect of Kalopissis' disclosure is in dispute.

Upon our view of Kalopissis, we find that Kalopissis, beginning at column 2, line 67 through column 3, line 24, discloses the following:

"The dye composition according to the invention are characterized by the following essential features:

- a. they must contain at least one of the compounds of the formula (I);
- b. they must contain a paraphenylenediamine or a paraaminophenol **or a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine** [emphasis added];
- c. they can contain, in addition to coupler (I), other known couplers such as: resorcin, metaaminophenol, 2,4-diaminoanisole, 7-hydroxyphenomorpholine, 2-methyl-5-ureidophenol, 2,6-dimethyl-5-aminophenol, 2-methyl-5-acetylaminophenol, 3-amino-4-methoxy-phenol, and the pyrazolones;
- d. **they can contain several oxidation bases** [emphasis added];
- e. they can also contain dyes in the form of leucoderivatives, in particular diphenylamines substituted in the 4 and 4 position by NH_2 or OH groups as well as other various substituents on the two benzene rings, which diphenylamines on oxidation produce indamines, indoanilines or indophenols;
- f. they can also contain direct dyes such as azo dyes, anthraquinones, nitrobenzene dyes, indamines, indoanilines or indophenols; and
- g. they can be utilized in the form of an aqueous or hydroalcoholic solution containing a lower alkanol, preferably ethanol or isopropanol."

Therefore, Kalopissis' dye composition can contain, *inter alia*, (b) a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine and (d) several oxidation bases.

Hence, there is a proper foundation found in Kalopissis to add additional oxidation bases to the dye composition of Kalopissis. The examiner relies upon Clausen for the teaching of

adding a diaminopyrazole to the dye composition of Kalopissis.¹
(answer, page 4).

Appellants argue that Clausen teaches away from a dye composition having both p-aminophenol and diaminopyrazole because Clausen teaches that diaminopyrazole is superior to p-aminophenol (e.g., that 4-aminophenol has been criticized for not being physiologically tolerated)², and because Kalopissis states that p-aminophenol (or another of the specifically identified bases) is essential in the dye composition of Kalopissis. (brief, pages 6-8 and reply brief, page 5).

¹ We note that appellants provide arguments at length about inconsistencies in the examiner's position regarding whether the diaminopyrazole is substituted for the p-aminophenol of Kalopissis or added in combination with the p-aminophenol of Kalopissis. Our focus in this decision is on the teachings of the applied art and therefore we address these arguments indirectly by our discussion of the teachings of the applied art. In this context, we note that, as mentioned, *supra*, Kalopissis states that a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyri can be used rather than a paraphenylenediamine or a paraaminophenol. Under this circumstance, the addition of "several oxidation bases" such as diaminopyrazole, rather than the substitution of p-aminophenol with diaminopyrazole, is a viable suggestion found in the combination of applied art. Alternatively, if the selection from Kalipissis is paraphenylenediamine or a paraaminophenol, because Kalopissis teaches that other oxidation bases can be added, the addition of "several oxidation bases" such as diaminopyrazole, is also a viable suggestion found in the combination of applied art, and we also refer to our reasonings set forth, *infra* on this issue.

² Appellants argue that a dye composition having p-aminophenol would be toxic. However, given the fact that both Kalopissis and Clausen indicate the use of a dye composition having p-aminophenol or 4-aminophenol, we are uncertain whether the level of toxicity is such that this compound would be banned from a dye composition. In view of the fact that appellants have not provided evidence showing that the level of toxicity is such that this ingredient absolutely cannot be used in a dye composition, we rely upon the facts set forth in the applied references which are that p-aminophenol is used in a dye composition and that 4-aminophenol has been criticized for not being physiologically tolerated.

We find that Clausen states that "4-aminophenol . . . has been criticized for not being physiologically tolerated". See column 1, lines 43-49. However, we disagree with appellants that such a teaching would dissuade one of ordinary skill in the art from adding diaminopyrazole to a dye composition having p-aminophenol. In this context, we compare the case of In re Gurley, 27 F.3d 551, 553, 31 U.S.P.Q.2d 1130, 1132 (Fed. Cir. 1994). The Court in In re Gurley considered a "teaching away" as representing one of several factors in ultimately affirming the board's decision on obviousness. Gurley claimed an epoxy-based printed circuit board exhibiting bendable and shape retaining qualities. The board sustained the examiner's section 103 rejection of Gurley's claims over prior art that disclosed material for forming circuit boards similar to those of Gurley, except that the material was a polyester imide-based resin rather than the epoxy resin claimed by Gurley. The prior art did acknowledge that epoxy was known for such use, but viewed epoxy-containing boards as inferior to polyester-imide-containing boards. On appeal to the Federal Circuit, Gurley argued that the prior art taught away from his invention by describing epoxy-containing boards as inferior. The court, however, rejected this argument, stating that a "teaching away" represents only one of a number of factors considered and weighed in determining obviousness. Stressing the importance of considering the "teaching away" in context, and according it appropriate weight, the court held that a known or obvious material does not become patentable simply because the art described it as somewhat inferior. Id.

Here, we determine that the teaching in Clausen that 4-aminophenyl has been criticized for not being physiologically

tolerated is just one of several factors to be considered and weighed in the determination of obviousness. As stated, supra, this teaching does not indicate that 4-aminophenol is banned as a useful compound in a dye composition; nor has appellants provided evidence in support thereof. Hence, such a teaching would not dissuade one of ordinary skill in the art to combine a diaminopyrazole with p-aminophenol, especially in view of the fact that Kalopissis teaches that other oxidation bases can be added to the dye composition of Kalopissis. Furthermore, as stated in footnote 1, Kalopissis teaches alternatives to paraphenylenediamine or to a paraaminophenol, such as a heterocyclic oxidation base such as 2,5-diaminopyridine or 2-hydroxy-5-aminopyridine, in combination with other oxidation bases.

Therefore, in view of the above, we determine that the evidence of obviousness, on balance, outweighs the evidence of nonobviousness proffered by the appellants. We therefore affirm the rejection.

Appeal No. 2002-2036
Application 09/486,558

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Edward C. Kimlin

Edward C. Kimlin)
Administrative Patent Judge)

Terry J. Owens

Terry J. Owens) BOARD OF PATENT
Administrative Patent Judge) APPEALS AND
INTERFERENCES

Beverly A. Pawlikowski

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Appeal No. 2002-2036
Application 09/486,558

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